IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF THE INLAND WATERWAYS, INC., A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The Respondent has raised three points in its brief and we will reply to the points in the same order as set forth in that brief.

REPLY TO RESPONDENT'S POINT I.

Background and Purpose of the Lucas Act.

The Respondent in discussing this point completely overlooks or ignores the statements of Senator Lucas, who proposed the original bill *which was never enacted*, wherein the Senator stated recently that the Statute that was ultimately enacted as the Lucas Act was entirely different from the one he had originally proposed. This language of Senator Lucas is set forth on Pages 71 and 72 of our

original brief and we, therefore, shall not repeat that language here.

The recent statements of Congress to which we have referred in point iv of our original brief and the opinions of the courts in *Howard Industries, Inc.* v. *U. S.*, in the Court of Claims No. 48874; *Warner Construction Co.* v. *Krug*, 80 Fed. Supp. 81; *Stevens Brown, Inc.* v. *U. S.*, 81 Fed. Supp. 969, and the history of the Act itself, all conclusively indicate that the conclusions of the Respondent and the courts below in this case are erroneous as to the background and purpose of the Lucas Act.

We cannot conceive of a clearer statement of this fact than the one recently made by Senator McCarran on September 13, 1950, before the Senate which can be found in the Congressional Record, Volume 96, No. 182, at page 14868, wherein he states:

> "It was the intent of Congress, in passing the Lucas Act, to offer relief beyond that afforded by the First War Powers Act."

Senator McCarran, at page 14866 of the same Congressional Record, after quoting from *Howard Industries, Inc.* v. *U. S.*, Court of Claims, No. 48874, stated:

> "Mr. President, this ends my quotation at this time from the decision of the Court of Claims. It is an excellent decision, and as one who participated in the drafting of the original Lucas Act, and was Chairman of the Committee on Judiciary at the time the Act was approved by the Committee, who handled the Act on the Floor of the Senate and who has followed it closely ever since, I can testify that this decision correctly states the facts and correctly interprets the legislative history of the Act."

This is from a Senator who speaks with unimpeachable authority.

Reply to Respondent's Point II.

Request for Relief.

It is admitted by the Respondent, as he must, that the decisions of the courts below in this case maintain that the request for relief under the Lucas Act must be a request for relief that only could have been granted pursuant to the provisions of the First War Powers Act, 1941.

It is now apparent that their conclusions are erroneous. The conclusion of these courts below is based upon:

1. Their mistaken ideas as to the history and background of the law, and

2. The invalid Executive Orders.

The decision of the Court of Claims in *Howard Industries, Inc.* v. *U. S.*, No. 48874, has this to say regarding what is meant by request for relief at page 4 of its opinion:

> "We cannot agree with the government's contention that the Lucas Act is merely an extension of the First War Powers Act and that only those claims that could have been allowed under that Act may be considered under the Lucas Act. We shall examine paragraph 307 (which is one of the regulations issued pursuant to Section 1 of the Lucas Act) first in the light of the expressed terms of the Act and secondly in the light of the Act's intent as expressed in its legislative history."

The conclusion of the Court of Claims on this point is found on page 5 of its opinion, wherein the court stated:

> "We accordingly conclude that paragraph 307 of Executive Order 9786 is a regulation unauthorized by the Lucas Act and is in direct conflict with the expressed terms of the Act and that its intent is reflected in its legislative history."

The language of the Act and of the men who supported this legislation from its inception and who were most responsible for its final enactment and their approval of the language and findings of the courts in *Howard Industries, Inc.* v. *U. S.*, *Stevens Brown, Inc.* v. *U. S.* and *Warner Construction Co.* v. *Krug* cases leave no doubt that the petitioner's request for relief is one which meets the requirements of the Lucas Act.

Reply to Respondent's Point III.

Settlement Agreement.

The Respondent's point III concerns itself with the settlement agreement and the validity of Paragraph 204 of Executive Order 9786. There is no doubt that the contention of the respondent is based only upon the language of the invalid regulation, paragraph 204, and has no basis in any of the language itself. Paragraph 204 of Executive Order 9786 is merely an attempt to put back into the Act something that was affirmatively rejected by Congress.

We call the court's attention to a Committee Print dated July 20, 1946 of the 79th Congress, Second Session on S 1477. It was suggested therein that that part of Section 3 of the Act providing that

> "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under the Act."

be entirely omitted. It was further suggested in the Committee Print that language be substituted in lieu thereof which would limit claims to cases where the claimant would have been granted relief under the First War Powers Act, 1941, and in which there was no final administration de-

termination prior to August 14, 1945, on such request for relief under the First War Powers Act. The Committee Print also had stricken and omitted Section 6 of the Act which provides for judicial review of claims where the claimant is dissatisfied with the action and decision of any department of the government in either granting or denying his claim.

These suggested limitations and changes were considered by the House Committee at the request of the Attorney General and this is evidenced by two letters dated July 7, 1946, from the Attorney General to the Chairman of the Committee on the Judiciary of the U. S. Senate, Senator McCarran and to the Chairman of the Committee on the Judiciary of the House of Representatives, Representative Hatton W. Summers, and were expressly rejected by the enactment of S 1477 into the Lucas Act as it was submitted and without the adoption of the suggested limitations we have just referred to.

So that we can see that Congress was requested to eliminate that portion of Section 3 which would give relief to claimants notwithstanding a previous settlement and that Congress expressly rejected and refused to adopt these changes and enacted into law Section 3 of S 1477, unchanged and as it was presented to it. Section 204 of Executive Order 9786, however, attempts to put into the law by Executive Order that which Congress expressly repudiated and under the authorities, the law is as stated by the court in *Border Pipeline Co. v. Federal Power Commission*, 171 Fed. 2nd at page 152 (November 22, 1948):

> "We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The argument that the Respondent makes in its point III that the Lucas Act is gratuitous legislation is not supported by these cases which provide for an appeal to the courts. The cases as cited by the Respondent and the

courts below involve legislation in which the administrative agencies were the final authority in the determination of the rights of the claimant. This is not so of the Lucas Act. Appeals are expressly provided for and are provided for on the most liberal terms imaginable. This is provided for in Section 6 of the Act which provides:

> "Whenever any claimant under this Act is dissatisfied with a department or agency of the government in either granting or denying his claim, such claimant shall have the right within six months to file a petition * * *"

with the proper court asking for a determination of his claim.

By the passage of the Lucas Act Congress created an obligation where one did not exist before. The case of *Pope* v. *U. S.*, 323 U. S. 1; 89 L. Ed. 3, adequately establishes our contention in this regard. In that case, the plaintiff had brought a suit in the Court of Claims for additional compensation under a construction contract and had been denied recovery. The Supreme Court denied certiorari. Congress subsequently passed a special Act directing this Court to render judgment upon the claims of the plaintiff upon a different basis of compensation from that considered in the original case. The Court of Claims dismissed the proceedings on the grounds that the special Act was beyond the Constitutional authority of Congress and reversing this position, the Supreme Court held that the Act created a new obligation of the government to pay the petitioner's claim where no obligation existed before and further observed:

> "The power of Congress to provide for the payment of debts conferred by Section 8 of Article 1 of the Constitution is not restricted to payment of this obligation which is legally binding on the government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary.

> "Congress by the creation of a legal in recognition of a moral obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal.
>
> "Nor do we think it did so by directing that the Court pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act to give judgments accordingly (Citing cases)."

We, therefore, can perceive that the execution of a final release or settlement by the petitioner in the instant cause does not bar further recovery under a new cause of action created by Congress. The release and settlement were applicable to such claims or causes of action as may have existed at the time of its execution. It did not, nor could it, apply to a claim that it may have by virtue of Congress imposing on the government a new and legally binding obligation where no such obligation had theretofore been in existence.

Judge Holtzoff, in *Warner Construction Co.* v. *Krug*, 80 Fed. Supp. 81, in speaking of the Settlement Agreement states:

> "Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did."

It must, therefore, be concluded that Congress, by expressly refusing to omit the provisions which provide that a previous settlement shall not operate to preclude further relief granted by the Lucas Act, *intended and determined* that the voluntary settlement between the parties herein shall be no bar to such relief from losses as the claimant shall be entitled under the provisions of the Act.

Conclusion.

The clearly stated objectives of the Lucas Act cannot be so misinterpreted or emasculated so as to prevent the granting of relief which Congress intended the petitioner to obtain. The orders and findings of the courts below, therefore, should be reversed and remanded with directions to proceed to grant the petitioner a hearing upon the merits within the purview and intendments of the Act.

Respectfully submitted,

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